STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 11, 2003
V	No. 235093 Ingham Circuit Court
PHILLIP JAMES SKIEF, Defendant-Appellant.	LC No. 00-075902-FC

Before: Markey, P.J., and Saad and Wilder, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of first-degree premeditated murder, MCL 750.316(1)(a), and first-degree home invasion, MCL 750.110a(3). He was sentenced to concurrent terms of life imprisonment without parole for the murder conviction, and 95 to 240 months' imprisonment for the home invasion conviction. He appeals as of right. We affirm.

Defendant argues that the trial court erred in allowing his ex-girlfriend to testify about a statement that he made to her two weeks before the decedent was killed, wherein he remarked that if he could not be with her, "we were all going to die." We disagree. The statement, which was embedded in a lengthy discussion about defendant's obsession with his ex-girlfriend's relationship with the decedent, was probative of defendant's motive to kill the decedent. The trial court did not abuse its discretion in admitting the statement. *People v Fisher*, 449 Mich 441, 453; 537 NW2d 577 (1995); *People v Herndon*, 246 Mich App 371, 412-413; 633 NW2d 376 (2001).

Defendant next argues that trial counsel was ineffective for failing to move to suppress the DNA test results on the basis that the prosecution failed to establish the chain of custody for several items and blood samples taken by the police. We disagree. Admission of the evidence did not require a perfect chain of custody. Once proffered evidence is shown to be what its proponent claims to a reasonable degree of certainty, any deficiency in the chain of custody goes only to the weight of the evidence rather than its admissibility. *People v White*, 208 Mich App 126, 130-133; 527 NW2d 34 (1994). With regard to the four items for which a questionable chain of custody was shown, each was taken to the Michigan State Police Crime Laboratory before defendant's blood was drawn. The record does not disclose a reasonable likelihood that any of the recovered items were improperly contaminated, either deliberately or inadvertently, with defendant's blood. Defendant has not shown that defense counsel was ineffective for not

moving to suppress this evidence. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Defendant's related argument challenging the comparison of fibers taken from a washcloth found in defendant's garbage with a towel and washcloth found in the decedent's apartment is likewise without merit. In addition to testimony by various police officers, statements by defendant's ex-girlfriend and an employee from the friend of the court established a reasonable likelihood that the items offered at trial were the same as those found during the investigation and tested by the prosecution's witness.

Defendant next argues that the trial court erred when it allowed the jury to submit questions to the witnesses. Because defendant did not object to either the instruction that allowed the jurors to ask questions, or the specific questions challenged on appeal, we review this unpreserved issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). "The practice of permitting questions to witnesses propounded by jurors should rest in the sound discretion of the trial court." *People v Heard*, 388 Mich 182, 187; 200 NW2d 73 (1972). Since the practice of allowing jurors to submit questions of witnesses is not per se improper, *People v Stout*, 116 Mich App 726, 733; 323 NW2d 532 (1982); see also CJI2d 2.9, and our review of the subject questions reveals that they do not reflect juror bias or prejudice, plain error has not been shown. Moreover, this Court is bound by the Supreme Court's decision in *Heard*.[1] *Boyd v WG Wade Shows*, 443 Mich 515, 523; 505 NW2d 544 (1993).

Defendant next argues that the trial court erred when it allowed a police officer to testify about a conversation with defendant's brother in which the brother described defendant's demeanor after hearing a news report about the charged offense, and after later speaking with his ex-girlfriend on the phone. Even if the admission of this evidence was improper, the error was harmless in light of the overwhelming evidence against defendant. In addition to the strong evidence of defendant's motive to kill the decedent, DNA analysis established that defendant's blood was found on several objects at the crime scene, and fiber analysis showed that a bloody

[1] The Supreme Court's opinion in *Heard* did not specifically address the concerns with this practice that defendant argues on appeal. For example, defendant claims that permitting jurors to propound questions encourages jurors to become advocates and engage in premature deliberations. In fact, several federal circuit courts of appeal strongly discourage trial courts from permitting juror questioning and recommend numerous procedures to safeguard against inappropriate juror conduct. See, e.g., *People v Collins*, 226 F3d 457 (CA 6, 2000); *United States v Bush*, 47 F3d 511 (CA 2, 1995); *United States v Richardson*, 233 F 3d 1285, 1290 (CA 11, 2000) (also stating that the practice should be used to clarify, rather than fill any gaps, in testimony); and *DeBenedetto v Goodyear Tire & Rubber Co*, 754 F2d 512 (CA 4, 1985). Defendant also contends that questions from jurors could aid the prosecution in meeting its burden of proof. In part for this reason, in *State v Costello*, 646 NW2d 204 (Minn 2002), the Minnesota Supreme Court abolished the practice of juror questioning in Minnesota. However, since we have found no plain error requiring reversal in this case, we decline to address these arguments. Defendant is free, of course, to seek to present these arguments to our Supreme Court for consideration.

towel found in defendant's garbage matched a set of towels from the decedent's residence. The prosecution also presented overwhelming evidence contradicting defendant's alibi defense, which included testimony from a friend of the court employee, and evidence of an excuse slip signed by defendant that contradicted defendant's testimony that he injured his hand after his visit to the office, rather than in the decedent's apartment. Defendant cannot show that, but for the admission of the challenged evidence, it is more probable than not that the outcome would have been different. *People v Smith*, 243 Mich App 657, 680; 625 NW2d 46 (2000).

Finally, any error in admitting a statement by defendant's ex-girlfriend, wherein she expressed her belief in defendant's guilt after speaking with defendant on the telephone, was also harmless. Even if we were to credit defendant's argument that this testimony amounted to improper opinion evidence, see, e.g., *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985); *People v Bragdon*, 142 Mich App 197, 199-200; 369 NW2d 208 (1985); *People v Parks*, 57 Mich App 738, 750; 226 NW2d 710 (1975), the overwhelming evidence against defendant, coupled with the trial court's instruction to the jury that it was to decide the facts of the case and the ultimate question of defendant's guilt, leads us to conclude that any error was harmless. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Affirmed.

/s/ Jane E. Markey
/s/ Henry William Saad
/s/ Kurtis T. Wilder